

**Cumberland Farms, Inc. and United Food and Commercial Workers Local 1360, AFL-CIO.**  
Cases 4-CA-19139-1, 4-CA-19139-2, and 4-CA-19171

July 24, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS  
DEVANEY AND OVIATT

On October 29, 1991, Administrative Law Judge Frank H. Itkin issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed a brief in support of the judge's decision, the Charging Party filed cross-exceptions and a supporting brief, and the Respondent filed a brief in answer to the cross-exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,<sup>1</sup> and conclusions and to adopt the recommended Order as modified below.<sup>2</sup>

The judge found that the Respondent violated Section 8(a)(1) of the Act when Maintenance Department Foreman John Messner and Human Resources Director Thomas Sweeney interrogated employees John Mariano and John Bartosh. In *Rossmore House*, 269 NLRB 1176 (1984), enfd. sub nom. *Hotel & Restaurant Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985), the Board reaffirmed the "totality of circumstances" test to determine whether interrogations of employees who are known union activists are unlawful. Applying that test, we agree with the judge that the Respondent violated Section 8(a)(1).

During the summer of 1990, the Union attempted to organize the Respondent's employees at its Florence, New Jersey facility. Sometime during the last week of July, employees Mariano and Bartosh attended a union meeting after which they immediately began distrib-

uting authorization cards at work. Mariano and Bartosh worked in the maintenance department under the supervision of Department Foreman John Messner.

Messner had at least two conversations with Mariano about the Union. In one conversation, which Messner initiated, he questioned Mariano about the attitude of other employees and asked how many authorization cards had been signed. Several days later, Messner asked Mariano and Bartosh how many authorization cards had been signed.

Messner also discussed the Union with Bartosh. One evening in the cafeteria, Bartosh, Messner, and other employees were talking about problems on the job. When Bartosh raised the subject of the Union, Messner seemed "all for it," but he declined to sign a card when asked to do so. Later that evening, according to Bartosh, when the employees were on a break, Messner raised the subject of the Union, asking "how was the support going for the Union and I [Bartosh] told him that it was going pretty good." In another conversation, Messner pointedly questioned Bartosh about how many employees in specific departments had signed authorization cards. Bartosh deliberately replied with misleading information.

Several days after Mariano started distributing cards, Mariano, Bartosh, and Messner encountered Thomas Sweeney, the Respondent's human resources director, in the plant parking lot. When Sweeney stopped his car, Mariano walked over to him. Sweeney inquired of Mariano, "Anything new I should know about around here like the union?" When Mariano replied no, Sweeney said, "Oh, John" and left.

The Respondent contends that the conversations described above were not coercive. The Respondent asserts that Messner was a low-level supervisor who was friendly with Mariano and Bartosh, that the two employees openly engaged in their union activities, that they initiated conversations with Messner about the Union, including asking him to sign an authorization card, and that Messner and Sweeney did not threaten Mariano or Bartosh.

We find that these possibly ameliorative factors are outweighed by (1) the fact that the interrogators sought information about other employees and the organizing effort in general, not simply Mariano's and Bartosh's attitude toward the Union; (2) the particularized nature of the information sought as to which groups of employees and how many had signed cards; (3) the repeated, probing, and focused nature of Messner's questioning; (4) Sweeney's high level within the Respondent's management team; (5) Sweeney's expressed exasperation after Mariano attempted to avoid answering Sweeney's inquiry about the Union. In addition we note that, within several days of these incidents, the Respondent unlawfully fired Mariano and Bartosh for

<sup>1</sup> The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

<sup>2</sup> In adopting the judge's finding that the Respondent violated the Act by threatening a union agent with arrest, we emphasize the judge's finding that the threat was directed at an individual who was on public property. We shall modify the judge's conclusions of law and recommended Order to reflect more precisely this finding.

We find merit to the Charging Party's request to make the notice clearer to the employees to whom it is addressed. Accordingly, we shall modify the recommended Order and notice by providing separate paragraphs for the 8(a)(1) violations.

their union activities, relying on a pretextual application of a no-solicitation rule.

Considering all the circumstances, we find that the Respondent's questioning of Mariano and Bartosh had a reasonable tendency to interfere with, restrain, and coerce them in the exercise of their rights guaranteed by Section 7 of the Act.

#### AMENDED CONCLUSIONS OF LAW

Substitute the following for Conclusion of Law 2.

"2. Respondent Employer violated Section 8(a)(1) of the Act by coercively interrogating employees about employee union sympathies and activities, and by threatening to have a union agent arrested while he was engaged in handbilling on public property near the entrance to the Respondent's Florence, New Jersey facility."

#### ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Cumberland Farms, Inc., Florence, New Jersey, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(a).

"(a) Coercively interrogating employees about employee union sympathies and activities."

2. Insert the following as paragraph 1(b) and reletter the subsequent paragraphs.

"(b) Threatening to have a union agent arrested while he was engaged in handbilling on public property near the entrance to the Respondent's Florence, New Jersey facility."

3. Substitute the attached notice for that of the administrative law judge.

#### APPENDIX

##### NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT coercively interrogate our employees about employee union sympathies and activities.

WE WILL NOT threaten to have a union agent arrested while he engages in handbilling on public property near the entrance to our Florence, New Jersey facility.

WE WILL NOT discriminatorily discharge our employees because they support United Food and Commercial Workers Local 1360, AFL-CIO, or any other

labor organization, or because they engage in other protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them in Section 7 of the Act

WE WILL offer employees John Mariano and John Bartosh immediate and full reinstatement to their former jobs or, in the event their former jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

WE WILL remove from our files any reference to the disciplinary actions and firings of employees Mariano and Bartosh and notify them in writing that this has been done and that evidence of this unlawful disciplinary action will not be used as a basis for future personnel action against them.

#### CUMBERLAND FARMS, INC.

*Richard P. Heller, Esq.*, for the General Counsel.

*Philip J. Moss and Thomas H. Somers, Esqs.*, for the Respondent.

*Peter V. Marks Sr., Esq.*, for the Union.

#### DECISION

FRANK H. ITKIN, Administrative Law Judge. Unfair labor practice charges were filed in the above cases on August 10 and 23, 1990. A consolidated complaint issued on November 28, 1990. The complaint alleges that Respondent Employer, in opposing the Union's attempt to organize and represent its employees at Florence, New Jersey, violated Section 8(a)(1) of the National Labor Relations Act by coercively interrogating employees about employee union sympathies and activities, and by threatening to have a union agent arrested while he was engaged in handbilling near the entrance to the Employer's Florence facility. The complaint further alleges that Respondent Employer violated Section 8(a)(1) and (3) of the Act by discriminatorily discharging employees John Mariano and John Bartosh because they were active on behalf of and supported the Union. Respondent Employer denies violating the Act as alleged.

A hearing was held on the issues raised in Philadelphia, Pennsylvania, on May 6, 7, and 8, 1991. On the entire record, including my observation of the demeanor of the witnesses, I make the following

#### FINDINGS OF FACT

##### I. JURISDICTION

Respondent Employer is engaged in the retail sale and distribution of dairy products, groceries, foodstuffs, and related products in Florence, New Jersey, and is admittedly engaged in commerce as alleged. Charging Party Union is admittedly a labor organization as alleged. We are principally concerned here with the Union's attempt during the summer of 1990 to

organize and represent Respondent's employees at its Florence facility, and Respondent's conduct in opposition to that organizational effort. The pertinent evidence is summarized below .

#### I. ALLEGED UNFAIR LABOR PRACTICES

##### *A. The Sequence of Events Culminating in the Suspension and Firing of Employees Mariano and Bartosh on August 3, 1990*

John Mariano testified that he worked for Respondent Employer at its Florence facility from January 1987 until August 3, 1990, when he was summarily suspended and then fired; that he was a maintenance mechanic working from about 4:30 p.m. until about 1:30 a.m. with four other maintenance mechanics; and that John Messner was the shift supervisor. Mariano recalled that Messner "assumed that job" about March or April 1990, and that Head Plant Engineer Allen Canney "introduced" Messner to the maintenance mechanics in Canney's office, explaining to them, "This is your new night time supervisor, John Messner."<sup>1</sup>

Mariano explained that Messner assigned him his work; "that there would be various job assignments that had to be done during the night and Messner would disseminate the jobs to certain mechanics," and that

some nights a mechanic or two were put on the production line . . . if [the production machines] broke down you had to fix them as fast as possible, and then there were various other duties that Canney had left for Messner to assign to the mechanics and he would assign each mechanic, whether you get put on the production floor or you have specific duties . . . .

Messner also "approved" Mariano's overtime. In addition, the night-shift maintenance mechanics did not have a "regularly scheduled" lunch period; they were, however, given a half-hour lunchbreak and two 15-minute breaks on each shift. Messner would decide "most of the time" when the mechanics took their lunchbreak, although occasionally a mechanic could use his "own discretion" depending on the time requirements of his particular job assignment that evening. Messner would similarly decide when the mechanics took their 15-minute breaks, and initialed employee time-cards.

Mariano next testified that he "first became involved" in the Union's organizational effort during late July 1990; that coworker John Bartosh had telephoned him and "said that some Union representatives were coming over [to Bartosh's home] and if I [Mariano] wanted to come over and see what they had to say"; and that during the "last week of July 1990" Mariano attended this meeting. Mariano and Bartosh were then given union authorization cards to distribute to the Florence employees. Mariano, together with Bartosh, started distributing the union authorization cards at the Florence facility the following day and continued for about 5 or 6 days until they were both suspended and fired.

<sup>1</sup> Counsel for Respondent, in his answer, denied the supervisory status of Messner. At the hearing, counsel explained that he was disputing Messner's supervisory status "as to time." (See Tr. 320.) Messner, still employed by Respondent, did not testify in this proceeding.

Mariano had distributed some 30 union authorization cards before his suspension and firing. He made these distributions in the Florence cafeteria and locker room during his lunchbreak and 15-minute breaks

because [Union Representative Roland] Priest and the other representatives had told us . . . only to give them out on your own time . . . between your lunch and your break . . . because you would probably get into severe trouble from the Company if you did anything else.

Mariano recalled that Messner thereafter discussed the Union with him "several" times before his suspension and firing. Messner would ask about employee response to the union membership solicitations by Mariano and Bartosh. During the last such conversation, as Mariano testified,

John Messner had said . . . to us or me . . . , how are you guys doing, have you got a lot of cards signed, how's the guys responding, I'm all for the Union. . . . I [Mariano] . . . said to Messner, if you're so much for the Union . . . sign the card. He said, I can't sign a card, I'm a supervisor. I said, well, John, if you can't sign a card I don't think this is any of your business, and I walked away.

Mariano next testified that during this same period, when he was distributing union membership cards to his coworkers, Messner assigned Mariano and Bartosh "to go with him and pull weeds from around the power transformer." The three then came upon Respondent's human resources director, Thomas Sweeney, in the parking lot area. Mariano recalled:

Mr. Sweeney stopped his car and said, hey, John . . . come here, and he said . . . hey, John, anything new I should know about around here like the Union? I said, no, Tom. . . . Sweeney said, oh, John . . . [and] went in his car.

Thereafter, on August 3, 1990, the Employer distributed to its Florence employees a letter signed by Plant Manager Robert Wood and Dairy Operations Manager Emanuel Cavaco, stating in part as follows (G.C. Exh. 10):

If it has not already occurred, you may soon be solicited by the United Food And Commercial Workers Union to sign an authorization card. . . . The Company does not believe that a Union will work in your best interests, and urges you not to sign a Union authorization card. The United Food And Commercial Workers Union has tried to organize the Company's employees on two previous occasions. Both times the Company's employees voted "no" to the Union.

Later, about 5:30 p.m. on that same day, as Mariano testified, Plant Engineer Canney "brought" Mariano "to a conference room in the front of the office area." Present in the conference room were Dairy Operations Manager Cavaco, Plant Manager Wood, Human Resources Director Sweeney, and Plant Engineer Canney. Mariano testified that during his 3-1/2 years of employment he had only seen Cavaco at Flor-

ence about six times. Cavaco then spoke. As Mariano recalled,

He said, John, I've got some complaints that you're distributing Union authorization cards around here. . . . Do you have anything to say for yourself? I said, Mr. Cavaco, I have a half hour lunch and two 15 minute breaks. He said, John, as many complaints as I've gotten that you're passing out cards in areas of the plant, you have to be doing it more than your 15 minute breaks and half hour lunch. . . . After that, he said, do you know we have a solicitation policy around here? I said, what is it. Mr. Cavaco, termination? He said, in some instances. I said, in that case, Mr. Cavaco, I'd like you to produce the witnesses, the people that said I've been passing out Union authorization cards. At that point, Mr. Sweeney interjected and said, we don't have to show you anything. Again, Mr. Cavaco spoke and said, John, do you have anything to say to redeem yourself? I said, no, I have nothing to say at this time. . . . Mr. Sweeney again responded with, John, you know we have a cause and a purpose here also. I said, I understand Tom. . . . Mr. Cavaco spoke again and he said, John, we took you out of the cooler, we put you in with maintenance to learn something, and this is how you repay us. Do you have anything to say for yourself? I said, no, Mr. Cavaco. He said, John, we're suspending you indefinitely.

Mariano was then told that he "wasn't allowed to go back to [his] locker" and "was escorted off the property" by Wood and Canney.

A week earlier, Mariano had discussed a salary increase with Wood, and Wood had then said, "he would see what he could do for me." Wood, as he escorted Mariano out of the plant on August 3, said to Mariano,

John, didn't we just speak about a week before about this [the salary increase], and then you pull something like this, do you have anything to say? I said, no.

Mariano was suspended without pay.

Wood wrote Mariano on August 10, 1990, apprising the employee (G.C. Exh. 8):

Please be advised that after a comprehensive investigation concerning the no solicitation policies of Cumberland Farms, Inc., you are advised that you are terminated as of August 10, 1990.<sup>2</sup>

During the time between the suspension and notification of firing, only Messner had telephoned Mariano, and stated: "It's a shame what happened to you. I'll see what I can do for you." Mariano recalled that he had never been "warned about soliciting" by management prior to his termination, despite the Employer's progressive discipline policy. (See G.C. Exh. 7.) And, Mariano noted that the first time he had been informed about the Employer's no-solicitation, no-distribution policy was at his meeting on August 3 with Cavaco. He had never seen a copy of General Counsel's Exhibit 2,

the Employer's no-solicitation, no-distribution policy, discussed in section B, *infra*.<sup>3</sup>

John Bartosh testified that he started working for the Employer in May 1988; that he worked in the maintenance department on the night shift with coworker Mariano prior to his summary firing on August 3, 1990; and that he "reported" to Messner. He explained that Messner "assigned" him his work; that Messner in turn reported to Engineering Department Head Canney who was not present during the night shift; and that Messner "couldn't fire or terminate anybody" "but he could write up people." Bartosh had been told by Day-Shift Supervisor Fred Brant that Messner "can't fire . . . all he can do is write up." Messner in fact granted Bartosh permission to leave work early.

Bartosh recalled that he had been on leave due to a work-related disability from about April 30 to July 27, 1990; that he became involved in the Union's organizational effort and attended a union meeting with coworker Mariano about late July; and that on his return to work on July 27, he passed out some 80 to 100 union authorization cards among the Florence employees until his firing on August 3. He testified that he passed out these cards in the cafeteria, the hallway to the cafeteria, the maintenance shop, and the garage. He explained, with respect to his distribution in the hallway, that involved "people going to lunch or people coming off lunch"; with respect to his distribution in the garage, "the mechanics were sitting down and taking their breaks" and he had been granted permission from Messner to "take a break"; and, with respect to his distribution in the maintenance shop, the employees involved were "off the clock" waiting to go home or on lunch and he had been granted permission to "take a break" by Messner.

Bartosh repeatedly discussed the Union with Messner. Bartosh recalled:

[W]e were talking about different problems we were having on the job . . . [and] why don't [we] have a Union in here, so I brought it into the subject and Messner seemed all for it.

Messner at first agreed to "help us out with this," but when "we asked him to sign a card he said no." Messner had "asked how was the support going for the Union" and Bartosh responded. Bartosh explained:

[Messner asked] how's the support going for the Union, have you got the Indians to sign up, did you get the truckers to sign up, did you get the garage people to

<sup>2</sup> Wood and Canney did not testify in this proceeding.

<sup>3</sup> On cross-examination, Mariano was asked to identify the specific employees solicited by him. He identified two of the solicited employees; however, he could not remember the names of the other employees. He also acknowledged that Messner performed some maintenance duties with other personnel. In addition, he acknowledged receiving a written disciplinary report from the Employer on March 30, 1987, for "taking too long for lunches" with a 1-day suspension after having been "previously warned for this" (R. Exh. 4); and a written disciplinary report on December 27, 1987, for "leaving early" "without permission" with a 3-day suspension. These 1987 disciplinary actions were long before his having been made a maintenance mechanic. On redirect examination, he explained that Messner did "hands on" work in the plant about 3 to 4 hours each night "according to whatever happens in the plant."

sign up . . . what's the percentages . . . [and] I gave him some really out of the ball park figures.

Bartosh next testified that about August 1 or 2, he witnessed the following exchange with Human Resources Director Sweeney:

Mr. Sweeney came up toward us in his car and he goes, hi guys, what's happening . . . anything I should know about . . . and after I shrugged my shoulders . . . he turned toward Mariano and says, hi John, how's everything going, anything happening that I should know about, maybe like a Union starting, and Mariano like brushed it off.

Subsequently, on August 3, as Bartosh "was just coming into the shop," Plant Engineer Canney handed Bartosh a copy of the Employer's letter to its employees in opposition to the Union's drive (G.C. Exh. 10). Bartosh was later "brought to the office" and there, like Mariano, met with Cavaco, Sweeney, Wood, and Canney. Bartosh testified:

[Cavaco] says, John we've been hearing that you've been soliciting on Company grounds, and I denied it . . . and then he goes, do you know what the penalty is for solicitation, and I said no, and he pulled out a three ring binder and he showed me the solicitation policies [G.C. Exh. 2] . . . I looked at them for a minute, and he says, we've had a lot of complaints that you've been soliciting, you've bother[ed] people on their lunch times, . . . in the passageway to the cafeteria. He said, what do you say, and I said, they're wrong. He says, well are you telling me all these people are liar[s]. I said, just about . . . and I said, well it's obvious then if I was soliciting and you've got all these numerous complaints you can go ahead and show me some evidence you've got against me, and he said, we don't have to show you anything. . . . [Cavaco] told me . . . how they sent me to school, how they transferred me to maintenance and how I owed them, and I turned around and slapped them in the face like this, and he said, he had no choice but to let me go, . . . and, I ain't sure if it was Sweeney or [Cavaco] said, don't try to take any action against us because if you do [we'll] only prove you were guilty.

Management then "escorted" Bartosh out. Bartosh, following his discharge, asked Plant Manager Wood if he "could get something in writing" stating the "reason" for his discharge, and Wood then responded: "You know you were fired for soliciting on Company property," and "that was the end of that."

Bartosh explained that he had never seen a copy of the Employer's no-solicitation, no-distribution policy (G.C. Exh. 2) before this meeting; and that he had never previously received a written or verbal "warning" or "discipline" or "suspension" from the Employer. Bartosh, however, recalled having been told earlier by Day Supervisor Fred Brant when Bartosh once asked "why doesn't this place have a union?"

You've got to watch about saying stuff like that around here because it's the quickest way to go out the door.<sup>4</sup>

Foster Macrides, the Employer's vice president of human resources, testified that the "decision" to "terminate" Bartosh and Mariano was made by Cavaco after "some consultation" with him. Cavaco telephoned him midmorning on August 2,

<sup>4</sup>On cross-examination, Bartosh acknowledged that Messner "punched a clock"; was not "salaried" like Canney; and "used tools" and "got his hands dirty." Bartosh further testified that he, Bartosh, would "sometimes" "work through lunch" and not "punch out" or "punch back," without having anyone "initial" his timecard. He also recalled missing lunch "entirely." He was uncertain whether or not he had worked through his lunchbreaks during his last week of employment. He was uncertain as to when and where he took lunchbreaks during his last week of employment. He explained: "I've taken my lunch just about everywhere in the plant," namely, the cafeteria, the maintenance shop, the cooler, the truck warehouse, the receiving bay, and outside on the ground; "every day it was something different." He was also uncertain when and where he took his 15-minute breaks during his last week of employment. His breaks lasted "as long as Messner told me that it lasted." He admittedly took some breaks in the cafeteria, the shop, the mechanic's garage, and "just walking around." He noted that he did not have the "same number of breaks every day" and sometimes was given more than two breaks. He further explained that most of his union authorization cards were distributed by him in the cafeteria.

Bartosh was then shown his Cumberland Farms employment application form (R. Exh. 6), dated May 9, 1988. He acknowledged that he had previously worked at Duracote and then had a "temporary job" for "about two weeks" at Sherwatt. He testified that his job "was phased out" at Duracote and he was "laid off" at Sherwatt. Bartosh was then shown his employment application form to Sherwatt, dated March 12, 1988 (R. Exh. 7). He claimed that everything in his application was true "to the best of my knowledge" with "whatever records I had." Counsel for Respondent argued (Tr. 471-472) that these application forms show entries of prior employers in "reverse order" and Bartosh "has contradicted himself in the two application forms . . . about the reasons why his employment terminated; . . . on the Cumberland Farm application he said he was laid off from Duracote; . . . on his application to Sherwatt . . . he gave a different reason . . . dead end job with no chance of advancing." Counsel for Respondent acknowledged (Tr. p. 476) that he was not claiming that Bartosh "was in any way disciplined in this proceeding because of anything contained in these applications." Later, counsel for Respondent argued (Tr. 595-600) that R. Exhs. 6 and 7 were "submitted for impeachment purposes" because they assertedly show that Bartosh "misrepresented facts on his employment application" to Cumberland Farms; R. Exh. 6 shows he was laid off at Sherwatt and Duracote whereas R. Exh. 7 states "his reason for leaving Duracote was deadend job"; and "he said on his application to Cumberland Farms [R. Exh. 6] [that] he was laid off from Sherwatt." Counsel for Respondent subsequently argued that, in addition, this evidence "affects the remedy" because assertedly Bartosh would have been fired "if this had come to light." See also the testimony of James Chapman (Tr. 665-674), employed by Sherwatt, to the effect that Bartosh was "terminated" by Sherwatt because he did not "report for work" after working there some 10 days.

To the extent the above evidence pertaining to Bartosh's prior employment and application forms bear on his credibility, I have considered this evidence with the remaining evidence on this full record. To the extent the above evidence pertains to remedy or reinstatement, this is more properly an issue for compliance. See *Escada (USA), Inc.*, 304 NLRB 845 (1991).

indicating he [Cavaco] had reports from supervisors . . . that there were solicitations occurring at the Florence plant . . . to sign union authorization cards.

Macrides directed Cavaco "to verify that our no solicitation policy was posted as it was supposed to be" and "to be sure that there were no violations of that policy." Macrides acknowledged that as of this date he had "no knowledge" of "any violation of the no solicitation rule" at the plant.

Macrides next testified that he spoke to Cavaco on the telephone during the morning of August 3. Cavaco then disclosed that Bartosh and Mariano "had been identified as people who had been involved in the solicitation process"; that Bartosh and Mariano were conducting solicitations "in several different areas of the plant" "while they were on working time" and the "other employees" were "at work"; and that neither Bartosh nor Mariano "had been punching out for their lunch break" in "an attempt to, perhaps, camouflage their activities." Cavaco intended "to interview" Bartosh and Mariano that evening to determine his "course of action."

Macrides next testified that Cavaco telephoned him on the evening of August 3 at home during dinnertime and related that Cavaco "had decided that it was appropriate . . . to terminate Bartosh based upon his violation of the no solicitation rule, the violations being numerous in nature," and "to suspend" Mariano "because" Cavaco "wanted to reflect on the information he had received." Macrides acknowledged that he knew of no other instances where the Employer had terminated or disciplined an employee for violating its no-solicitation, no-distribution policy. Macrides also acknowledged that he did not conduct any independent investigation here, and that he was unaware of any warnings, writeups, or similar papers in the files of Bartosh and Mariano "faulting them for not punching out at lunch time." Macrides denied, *inter alia*, that the Employer's letter to its employees dated August 3, 1990, opposing the Union's organizational drive (G.C. Exh. 10), had "any connection with" the terminations of Bartosh and Mariano.

On cross-examination, Macrides testified that Cavaco told him during their initial August 2 conversation that "it appeared . . . there was solicitation during working hours." Macrides later testified that during their second conversation on August 3 "there was mention of . . . several instances." Macrides claimed that during this second conversation Macrides and Cavaco discussed that "there was perhaps a need here to consider prior to the interview of these two gentlemen . . . some form of discipline up to and including perhaps suspension or discharge." Macrides elsewhere testified that there was no "discussion" about "whether a lesser punishment other than discharge would be administered" "because I considered it to be serious." Macrides admittedly had not checked on "any prior violations" by the two employees; did not conduct "any other investigation"; and was somewhat unclear about the specifics which Cavaco had related from his investigation.

Macrides next recalled that during his third conversation with Cavaco he was informed that Cavaco decided to "terminate" Bartosh and "suspend" Mariano. The reason for this distinction was assertedly that Mariano "knew" of the Employer's no-solicitation, no-distribution policy but denied violating the policy, whereas Bartosh denied knowledge of

the policy and violating it. Macrides and Cavaco would "discuss Mariano's situation the following week." Elsewhere, Macrides testified that he considered both employees' conduct a "blatant attempt" to violate the Employer's "policy." He emphasized the failure of both employees to "punch out." Mariano admittedly was "terminated" the following week apparently without any further investigation, and the "reason" given to both employees for their "termination" was a violation of the Employer's no-solicitation rule and "not their failure to punch out." Macrides later added: "they were being terminated for a violation of the no solicitation rule"; not for "failure to punch their timecards"; "why terminate them twice."

Macrides acknowledged that the Employer has a "progressive discipline" policy. (See G.C. Exh. 3.) Macrides asserted that he was unaware of "any exceptions" to the Employer's no-solicitation, no-distribution policy at the Florence facility, as discussed in section B, *infra*. When asked what he would have done in one or more of those "exceptions" and whether he would have terminated or invoked a lesser discipline, Macrides responded "I don't know what I would have done." Moreover, although the Employer also has a "policy" against "sexual harassment," a recent complaint by a female employee against a male employee for a "very serious" violation of this "policy" resulted only in a "written warning." As noted, Macrides knew of no other instances where the Employer had terminated or disciplined an employee for violating its no-solicitation, no-distribution policy.

Emanuel Cavaco, director of dairy operations for the Employer at its four dairy plants, testified that he arrived at the Florence plant on August 1 "to spend the rest of the week reviewing the operations" and that Supervisor Gene McGee apprised him later that same day that an hourly employee had "said that he was approached and given a union authorization card." Cavaco telephoned Macrides the following morning August 2, and

told Foster [Macrides] what Gene McGee had told me the prior night. Both [Macrides] and [Cavaco] agreed that there was a possibility that the no solicitation rule might be violated and since [Cavaco] was there [he] should look into it.

Cavaco claimed that when he left the plant on August 2 he observed that the Employer's no-solicitation, no-distribution policy was posted near the timeclock.

Cavaco next testified that on August 2 he conducted a meeting of the plant supervisors and related to them McGee's "information" and "reminded them again of the no solicitation rule." Cavaco told the supervisors: "Keep an eye out, your ears [open], if you should hear anything, let me know, take no action on your own." Cavaco did not "have any knowledge at all that there had been any prior violations of the no solicitation policy at Florence." "Shortly after" this meeting, as Cavaco further recalled, "several employees" related "information" to Cavaco identifying Mariano and Bartosh as the persons engaged in "soliciting employees to sign Union cards."

Cavaco recalled that the first person "to inform" him after this meeting was Frank Rollence. Rollence was the "driver supervisor." Cavaco related his conversation with Rollence, as follows:

Frank [Rollence] said . . . yesterday a couple of my delivery drivers informed me, first Bruce Spencer, . . . that he had been approached by Bartosh and handed a bunch . . . of Union cards and asked to sign and distribute the rest throughout the drivers. . . . [A]nother driver, Al Johnson, . . . was in the plant cafeteria getting a drink and . . . he was approached by Bartosh and given a Union authorization card and [asked] to sign.

Cavaco admittedly did not know what Spencer was “doing” at the time of the above “encounter” or whether in fact he was on a “break.” Johnson apparently was on “break” in the cafeteria.<sup>5</sup>

Cavaco next recalled that Laboratory Manager John Pcsolar came to him after the meeting, and said:

[Pcsolar] on July 31 . . . around 7 p.m. . . was walking into the cafeteria to grab a quick smoke and there were some employees leaving the cafeteria and Bartosh and Mariano were in the cafeteria, and Mariano said to the various employees . . . don’t worry about it . . . it only costs \$5.00 a month or something like that . . . . [T]he same evening . . . about 9:30 [Pcsolar] went back to the cafeteria to get a drink . . . Bartosh and Mariano were in there with a group of employees . . . and Mariano [said] hey everybody be quiet here comes John.

Cavaco similarly recalled that cooler employee Andy Noel “came to me and said that on the night of August 1 he was in the cafeteria around 8:15 p.m.” and, together with other employees in the cafeteria, was urged to sign a Union card by Bartosh and Mariano. Cooler employee Kyle Beck also related that he too was “approached” by Bartosh and Mariano in the cafeteria about 10 p.m. that same evening. Beck assertedly was again “approached” by Mariano the following afternoon—around 5:30 p.m. “in the hallway” “on his way to work.”<sup>6</sup>

Finally, Cavaco recalled being told, after his supervisors’ meeting, by Truck Mechanic Foreman Ron Stiling that on

August 1 [Stiling] was going into the truck garage . . . around 10:45 . . . another mechanic Russ Atkinson was coming out of the garage break room [with] Mariano and Bartosh . . . they walked away from him . . . out into the garage [and] talked for another 10 or 15 minutes . . . . [Atkinson’s] break was over and he definitely was on work duty.

Stiling assertedly heard the word “organize” used.<sup>7</sup>

Cavaco did not speak with anyone else. He then called for Mariano’s and Bartosh’s timecards. Cavaco testified that these cards for the week ending August 4 show that “there’s no punching out for their lunch breaks” in violation of the Employer’s “lunch and rest breaks” policy. (See R. Exhs. 13 and 14.) Cavaco asserted that, “reviewing both [of] their

timecards going back quite some time . . . for the most part they were all punched out for lunch”

in looking at a lot of timecards for a long period of time they were consistently doing it [punching out]. All of a sudden, I go to August 4 to see when they’re on lunch and I don’t see anything punched out. . . . Well, my conclusion, putting it all together, is that they were purposefully and knowingly not punching out for lunch that week and breaking one rule as an excuse to break another.

On the following morning of August 3, Cavaco telephoned Macrides and related to him Cavaco’s “conclusion” that Mariano and Bartosh were engaged in a “deliberate violation and . . . it was grounds for termination.” Cavaco interviewed Mariano and Bartosh later that same day. Mariano assertedly admitted being aware of the Employer’s no-solicitation, no-distribution policy but denied violating this policy. Mariano requested to confront those who accused him of such violations. Cavaco refused. Cavaco denied, inter alia, various other statements attributed to him by Mariano. Cavaco “suspended” Mariano and said “we would get back to him.” Cavaco then interviewed Bartosh. Bartosh denied being aware of the Employer’s no-solicitation, no-distribution policy and violating this policy. Cavaco concluded that Bartosh was “lying.” Bartosh also wanted to confront his accusers and was refused this request. Cavaco “fired” Bartosh. Cavaco also denied, inter alia, statements attributed to him by Bartosh. Cavaco telephoned Macrides to report on the interviews. Mariano was later notified of his “termination.”

Cavaco claimed that Mariano and Bartosh were in fact “stealing Company time.” He acknowledged, however, that “no effort was made to adjust the timecards of Bartosh and Mariano for their [last] week of work.” He further explained that, regardless of whether or not Mariano and Bartosh punched out for lunch, management “would have deducted the half hour lunch from their pay for those days.” Moreover, the timecards for Mariano and Bartosh show that they frequently had failed to punch out for lunch between January 1 and July 30 without any apparent penalty or disciplinary action by management despite the fact that management audited these cards at the end of the pay periods involved. Thus, Mariano did not punch out for lunch during the entire month of July (R. Exhs. 21(b)–21(f)); the entire week ending June 30 (R. Exh. 21(f)); 3 days during the week ending May 5 (R. Exh. 21(n)); and 1 day during the week ending January 27 (R. Exh. 21(aa)). Bartosh did not punch out for lunch 1 day during the week ending April 14 (R. Exh. 22(p)); 1 day during the week ending March 31 (R. Exh. 22(r)); 1 day during the week ending March 24 (R. Exh. 22(s)); 1 day during week ending March 10 (R. Exh. 22(u)); 1 day during the week ending March 3 (R. Exh. 22(u)); 2 days during the week ending February 24 (R. Exh. 22(w)); 1 day during the week ending February 17 (R. Exh. 22(x)); 1 day during the week ending February 10 (R. Exh. 22(y)); 1 day during the week ending February 3 (R. Exh. 22(z)); 1 day during the week ending January 27 (R. Exh. 22(aa)); 1 day during the week ending January 13 (R. Exh. 22(cc)); 2 days during the

<sup>5</sup> McGee, Rollence, Spencer, and Johnson did not testify in this proceeding.

<sup>6</sup> Pcsolar, Noel, and Beck did not testify in this proceeding.

<sup>7</sup> Atkinson did not testify in this proceeding. Stiling’s testimony is summarized below.

week ending January 20 (R. Exh. 22(bb)); and 2 days during the week ending January 6 (R. Exh. 22(dd)).<sup>8</sup>

On cross-examination, Cavaco acknowledged that he is not ordinarily involved in the discharge of employees "on a day to day basis"—"it depends on the circumstances." He also acknowledged that when he first spoke to Supervisor McGee on August 1, McGee did not "tell him whether the employees were soliciting on their breaks or work time." Nevertheless, "based solely on that conversation" with McGee he informed Macrides the next morning, August 2, that "there was a possibility . . . the no-solicitation rule was violated." He claimed that he based this conclusion upon "common sense" and did not "investigate that possibility at all at that time." Cavaco further acknowledged that at the meeting of supervisors on August 2 "no one said that they were aware of any unlawful solicitation"; it was not until later when Rollence followed by the others first spoke to him. Cavaco also acknowledged that, with respect to the driver employees assertedly involved in the above solicitations, "drivers don't clock in"; they do not "get paid by the hour"; they "normally" will take "breaks" on the road; "when they come back they're on relief"; and they do not "need to get permission to take a break when they are in the yard" at Florence. In addition, Cavaco admittedly would not "know" whether a supervisor or foreman "tells employees to take extra breaks."

Cavaco further acknowledged on cross-examination that he had observed from the timecards that Mariano "was not punching out" long before the Union's organizational effort. He made no effort to "find out why" before "suspending" the employee. He also did not examine the timecards of other mechanics "to see whether they were punching out during that time." And, although Cavaco denied knowledge of any "exceptions" to the Employer's no-solicitation, no-distribution policy at Florence, he had heard about the collection held at the plant for a supervisor whose house had burned down; he had made no effort to determine if that collection was on worktime; and, had he discovered that such a collection was in fact on worktime, "what he would have done" is "a tough one to answer." Cavaco admittedly refused to "bring forward" the employees who had assertedly identified Mariano and Bartosh as violating the no-solicitation rule although requested to do so at the August 3 interviews; and he also did not then "mention their timecards" to Mariano and Bartosh.<sup>9</sup>

Ron Stiling is employed by Respondent as a foreman in its Florence garage. Stiling claimed that on August 1, 1990, he observed Bartosh and Mariano "in the garage area"

"near the break room" "talking to" employee Russ Atkinson. Stiling added that he was "in charge of the shift that evening"; Bartosh and Mariano "were around there in the break room talking to employee Atkinson"; Atkinson "was on the clock and we had work to do"; and, when Stiling asked Atkinson "what was going on," they "took the conversation outside" the break area. Later, Stiling "noticed a Union application on" Atkinson's tool box and "left it at that." Stiling insisted that Atkinson was not on "break" at the time. Stiling further claimed that this conversation or meeting took 15 to 20 minutes. In addition, Stiling asserted at one point that he was aware of the Employer's no-solicitation, no-distribution policy because it had been "posted" "on the employee bulletin board in the garage" and in the "lunchroom." On cross-examination, Stiling acknowledged that he first mentioned the above incident to "Company officials," including the plant manager, "two days" after the incident; he "waited" because he "didn't think it was a serious issue"; and, although he was "in charge of Atkinson" and had "some authority to tell Atkinson where to be at the time," he did not attempt to prevent Atkinson from continuing his conversation with Bartosh and Mariano. Stiling then acknowledged:

Q. Did you know whether it violated any Company policy?

A. No. I was not aware of it at the time . . . no, I wasn't aware of it.

Atkinson was never disciplined for this conduct.<sup>10</sup>

Darrell Cleaves, also a foreman at Florence, claimed that on August 1 he met Bartosh while "going to lunch"; Cleaves "was going to lunch" and Bartosh "was coming from out the other way"; and Bartosh

came up to me and he said here's a Union card; fill it out; so I went to the time [clock and] punched out. . . .

Cleaves was some 15 feet from the timeclock at the time. He later gave this card to his supervisor because he "didn't want to have anything to do with it." Cleaves admittedly was also not "aware of a Company policy regarding solicitation" at that time.<sup>11</sup>

Jason Kerezsi, a mechanic in the Florence garage, recalled that on July 31, Bartosh came to the garage to pick up a forklift; that Bartosh then spoke to him about "joining the Union"; that he could not "remember any details of the conversation"; that he was offered a union card; that Bartosh "drove off"; that he was not on break; and that the incident took "about ten minutes."<sup>12</sup>

<sup>8</sup> Cavaco elsewhere claimed, apparently with reference to Bartosh's 1988 job application forms (fn. 4, *supra*), that "falsification of the information on an employee's application [is] formal grounds for immediate termination." He later added, apparently referring to testimony by foreman Ron Stiling (fn. 10, *infra*), the "use of abusive or intimidating language to other employees [is also] grounds for immediate discharge."

<sup>9</sup> Plant Human Resources Manager Thomas Sweeney denied, *inter alia*, asking Mariano "whether there was any organizing going on," although he admitted that he had exchanged greetings with Mariano on the particular occasion in the plant parking lot. Sweeney also denied any "participation" in the "decision" to fire Mariano and Bartosh.

<sup>10</sup> Stiling, during his direct testimony, also claimed that, "while waiting outside in the lobby . . . to be called as a witness" in this proceeding, he heard Bartosh say: "There is one of the fucking back stabbers. That Company is going under in a year anyway."

<sup>11</sup> As counsel noted at the hearing, Cavaco apparently did not rely on this incident in determining to terminate Bartosh. See Tr. 829–830.

<sup>12</sup> This incident was also apparently not relied on by Cavaco in deciding to terminate Bartosh. See fn. 11, *supra*.



*B. The Employer's No-Solicitation, No-Distribution Policy, and Evidence Pertaining to its Posting, Enforcement, and Application*

General Counsel's Exhibit 2, dated April 23, 1990, states the Employer's no-solicitation, no-distribution policy, in pertinent part as follows:

[T]he Company wishes to remind all employees of the existing policy regarding solicitations. The Company understands that employees may wish at times to solicit fellow employees with respect to certain charities, boy/girl scouts and the like. This can only be done within the framework of the Company's policy which is stated below. Infractions of the policy will cause the initiation of disciplinary action to those employees involved in any infraction.

5.3 Employees may not engage in solicitation for any purpose of another employee during that employee's working time, or during their own working time, or in any customer or selling area of the store.

5.4 Employees may not distribute literature to another employee during that employee's working time, or during their own working time, or in any work area.

5.5 Violations of these policies will result in disciplinary action.

Stephanie Morris, employed by Respondent as a "special picker" in the cooler section at the Employer's Florence facility from late 1987 until her termination in May 1990, testified that the Employer had bulletin boards near the timeclock and lunchroom; that she examined the bulletin board near the timeclock frequently during her last few weeks of employment; and that she never saw a copy of General Counsel's Exhibit 2 posted on the bulletin board. She also denied being told by the Employer "about any rules regarding solicitation and/or distribution of literature."

Morris then related repeated attempts by supervisors and employees to solicit her at work during 1989 and 1990. Pam Griffin, her supervisor in the cooler section, repeatedly asked her and her coworkers while working to purchase items like Christmas bulbs and candy. These solicitations consumed on occasion up to 10 or 15 minutes. Employee Steve Peaker attempted to sell her and her coworkers while working raffle tickets. These solicitations consumed on occasion up to 5 minutes. Employee Terri Pruden attempted to sell her and her coworkers while working, including Supervisor Venu Patell, plants, plant hangers, and related merchandise. Employee Pam Davis attempted to sell her and her coworkers while working "all different kinds of stuff like different food." Employee Darryl Emery attempted to sell her and her coworkers while working "something to do with his church." This transaction took about 5 minutes. Employee George Conliff repeatedly attempted to sell her candy while working and then engage in extended nonwork-related conversations. Supervisor Gene McGee, in charge of the cooler section, solicited donations from her while working for a person whose home had caught fire. This solicitation took about 15 minutes. Foreman Ron Hopkins solicited her for money while working for an employee who had had a heart attack.

Morris noted that the Employer had no rules "prohibiting" employees from "speaking to other employees at

work" and it was "common to see people talk" "all day long." During the above-enumerated solicitations and conversations, supervisors were generally positioned in the "penthouse" overlooking the cooler "so they can see what's going on." Morris was terminated by the Employer before the onset of the Union's organizational campaign.<sup>13</sup>

Employee Mariano also testified that he too had been similarly solicited at work. Employee George Conliff attempted to sell him candy in the maintenance area while working. Employee Rick Willits attempted to sell him cookies in the cooler while working. And, a supervisor identified as Freeman solicited a donation from him while working in the battery charging area for another supervisor whose house had "burned down." See also the testimony of employee Bartosh relating the same and similar solicitations while working. (See Tr. 435-438.)

The Employer's vice president of human resources Foster Macrides testified that General Counsel's Exhibit 2 is the Employer's no-solicitation, no-distribution policy; that he directed that it be "posted" at all Company facilities about April 23, 1990; that he also spoke to the plant supervisors at the various facilities about this policy; and that General Counsel's Exhibit 2 was a "revision" of the prior policy. According to Macrides, General Counsel's Exhibit 2 was intended to "clarify the policy" so that "employees would understand that there are certain solicitations within the no solicitation rule which are permitted." Elsewhere, Macrides testified that the Employer "will rarely permit solicitations to occur." The "prior posted" policy of the Employer was not made available. In addition, Macrides denied, inter alia, any knowledge of the various solicitations at the Florence facility as detailed above. And, as stated, Macrides was unaware of any other instances where the Employer had terminated or disciplined an employee for violating this policy.<sup>14</sup>

George Beren, office manager at Florence, testified that there are four bulletin boards at the Florence facility; one in the security guard shack, one in the office area, one in the cafeteria, and one in the garage area. Beren referred to Respondent's Exhibit 12, the multipage revised no-solicitation, no-distribution policy of the Employer. He generally asserted that this "policy" was "posted" on the "bulletin boards" during the pertinent time period and that he "posted it." He explained that he only "posted the one in the transportation area" and "assisted in posting the one in the cafeteria." When asked about "the bulletin board near the time clock," as testified to above, he testified, inter alia, that he did not "know" about that; that in fact he "did post it above the time clock"; and that he "believe[s] there was" one posted there. When asked: "It is your testimony that such notices you have in front of you were posted above the time clock,"

<sup>13</sup> On cross-examination, Morris acknowledged that she had been "fired" by the Employer. She generally denied that her "termination" was because she had refused to perform a job assignment. She had, however, filed a claim for unemployment compensation. The State division of unemployment and disability insurance ruled that her discharge was due to her refusal to perform assigned work and denied her claim. See R. Exh. 1; Tr. 292-297.

<sup>14</sup> Plant Human Resources Manager Thomas Sweeney testified that he too was unaware of any solicitations at Florence in violation of the Employer's no-solicitation, no-distribution policy before August 1. He also attempted to show inconsistencies in the testimony of Morris and other employee witnesses. See Tr. 835-837.

he responded: "No. I couldn't say for sure." When asked if he had any "personal knowledge prior to August 3" of anybody violating the no-solicitation, no-distribution policy, he responded: "To my knowledge no, not really." He later recalled being solicited for a contribution for a supervisor whose house had burned down.<sup>15</sup>

*C. The Events Attending the Union's Handbilling on August 16, 1990*

Roland Priest, the Union's director of organizing, testified that on August 16, 1990, he accompanied employees Bartosh, Mariano and others to the Employer's Florence facility in an attempt to distribute union literature at or near the entrance to the plant.<sup>16</sup> There is one main entrance to the Employer's Florence plant at the end of Cumberland Boulevard, a public road. (See G.C. Exh. 4.) Cumberland Boulevard runs from U.S. Route 130, a four-lane interstate highway, a distance of some 200 to 400 feet to the entrance of the Employer's plant.

Priest and his group arrived about 10 a.m. and parked their vehicles in the parking lot adjoining a vacant building off Cumberland Boulevard. Priest immediately notified the local police that his group would be handbilling "25 or 30 feet off of Route 130." Priest then "started toward the guard area" of the Employer's premises although the "rest of the people [in his group] just scattered on Cumberland Boulevard," "standing close to the curb passing out literature," and remained further distant from the entrance to the Employer's premises. Priest took photographs as he moved "toward the guard area." (See, for example, G.C. Exhs. 5(a) and 5(b).) Priest recalled that he was some 20 to 30 feet from the Employer's "security building" when he took the above pictures and some 35 feet from a "no soliciting sign" attached to a fence, as depicted on General Counsel's Exhibit 5(b).

Priest next recalled:

I was standing . . . where I marked the "x" [on G.C. Exh. 4] and an elderly gentlemen dressed in a security uniform and another gentleman with a tie and shirt [were] walking toward me talking. . . . At that time I couldn't hear them, so I started toward them [and we met] in the middle of the street [as depicted by the "y" on G.C. Exh. 4]. . . . The elderly guard told me that I was on Cumberland Farms property and if I didn't remove myself . . . he would have us arrested.

The "guard" did not "indicate where the property line started." The local police arrived shortly thereafter, but made clear that Priest and his group were "not doing anything wrong" and "drove away." Priest then returned to the spot designated "x" on General Counsel's Exhibit 4, and resumed handbilling and distribution activities for the remainder of the day.<sup>17</sup>

<sup>15</sup> Compare the testimony of Cavaco, Gleaves, and Stiling summarized supra.

<sup>16</sup> The literature included copies of the unfair labor practice charge filed herein and union authorization cards.

<sup>17</sup> Priest, on cross-examination, identified R. Exh. 2 as another photograph taken by him, showing generally where he stood in the spot designated "y" on G.C. Exh. 4. Priest was then some 20 to 25 feet away from the individual shown in R. Exh. 2. Counsel for

Employee Mariano testified that he was present during the August 16 handbilling along Cumberland Boulevard, and that

I [Mariano] happened to look down toward the guard shack and Priest was standing there with two individuals. I recognized one as old Hank, he's the supervisor of security for the guards of the Florence plant.

Mariano placed Priest some 10 to 15 feet "from the property line," the fence and guard shack, of the Employer. Mariano, however, did not hear the conversation between Priest and the security personnel.

Arthur Gordon, admittedly an agent of Respondent Employer, was in charge of "security operations" at the Florence plant prior to his retirement in late 1990. He recalled that on August 16 he observed "individuals in the middle of Cumberland Boulevard stopping traffic and passing out leaflets." He claimed that he was concerned that "one of these people could be injured by our vehicles" and therefore telephoned the police. He then "went outside to meet them" standing "a little right next" to the guard shack. One of the "people" from the Union "came down towards" Gordon, and

in [Gordon's] understanding, [that person] was either on our property line or very close to our property line.

Elsewhere, Gordon claimed that the "person" was in fact on the Employer's property line even though the "person" was "not past the entrance fence." Elsewhere, Gordon claimed that he told this person: "if he crossed onto our property . . . I would have him arrested." Gordon assertedly did not ask the police to arrest this "person."

On cross-examination, Gordon acknowledged that the Employer's property line is not "marked in any way as being the property line"; that the Union "person" was "standing" at the time at a point "where the Company ordinarily stops visitors"; that he did not say to the Union "person" "you are on Company property"; that he did not tell the Union "person" "where the property line is"; and that, "if he was on Company property it was only by a foot or so." Gordon insisted that he was alone at the time wearing civilian clothes and a "supervisor" named "Hank" "remained in the guard shack." Gordon acknowledged that he never went to the union "people" and attempted to "explain to them" his concern that they might be "knocked down by a truck".<sup>18</sup>

I credit the testimony of Mariano, Bartosh, Morris, and Priest as detailed supra. Their testimony, as demonstrated above, is in significant part mutually corroborative and

Respondent, when asked to explain the Employer's position with respect to this alleged violation, stated at the hearing that Priest "may have been on private property"—"it's not clear to me at this point." See Tr. 98–99. Cf. G.C. Exh. 16, fn. 18, discussed below.

<sup>18</sup> I note that "Hank" the "supervisor" never testified. Further, counsel for Respondent, in his pretrial letter to the counsel for General Counsel (G.C. Exh. 16), stated, inter alia:

While Gordon was standing in front of the guard shack waiting for the police to arrive, one of the Union representatives came up to him (on Company property) and took his picture. Gordon informed him that he was on Company property and asked him to leave.

See also the testimony of Plant Human Resources Manager Thomas Sweeney. Tr. 840–842.

uncontroverted. Their testimony also withstood the test of extensive cross-examination. And, on this full record, they impressed me as trustworthy and reliable witnesses. On the other hand, I do not credit the testimony of Cavaco, Macrides, and Sweeney. The testimony of Cavaco, Macrides, and Sweeney, as demonstrated above, was at times vague, unclear, incomplete, contradictory, unsubstantiated, and shifting. They did not impress me as credible and trustworthy witnesses.

Thus, for example, Mariano and Bartosh testified at length about their organizational activities and Messner's repeated interrogation of the two employees as well as related conduct. They also detailed Messner's indicia of supervisory status. Although counsel for Respondent was only disputing Messner's supervisory status "as to time" (Tr. 320), Messner, still employed by the Company, was never called as a witness to deny or explain the statements and conduct attributed to or witnessed by him.

In addition, Mariano and Bartosh testified at length about their final August 3 interviews with management. Their detailed testimony was mutually corroborative as to the Employer's treatment of these two union protagonists. The responsive testimony of Cavaco, Macrides, and Sweeney was at time, vague, unclear, incomplete, contradictory, unsubstantiated, and shifting. Sweeney, the Employer's plant human resources director, generally denied "participation" in the "decision" to fire Mariano and Bartosh. The other representatives of management present during these interviews did not testify. Sweeney also generally denied interrogating Mariano earlier in the plant parking lot in the presence of Bartosh and Messner, although he admitted having a conversation with Mariano on the particular occasion. Messner, who was present during this conversation in the parking lot, did not testify.

Likewise, the testimony of Cavaco and Macrides does not withstand close scrutiny in this and related respects. Cavaco and Macrides asserted that Mariano and Bartosh were fired because they had engaged in a "blatant" and "deliberate" violation of the Employer's no-solicitation policy. Macrides conducted no independent investigation of this alleged "blatant" and "deliberate" violation. Cavaco's asserted investigation was at best cursory and, as demonstrated above, is essentially unsubstantiated in this record. In short, this record does not support management's assertion that Mariano and Bartosh engaged in a "blatant" and "deliberate" violation of the Employer's no-solicitation policy. In fact, the testimony of Respondent's witnesses shows that by and large Mariano and Bartosh complied with the Union's admonition that they conduct their organizational activities in break areas during breaktimes. And, the mutually corroborative testimony of Mariano, Bartosh, and Morris carefully documents management's repeated tolerances in the past of exceptions to its no-solicitation, no-distribution policy.

Cavaco and Macrides elsewhere shifted to the failure of Mariano and Bartosh to punch out for meal breaks in an attempt to justify their terminations. However, the undisputed evidence of record shows that the two employees, on many occasions before their organizational efforts, had failed to punch out without discipline. Cavaco did not even mention to or fault the two employees for failing to punch out during his final interviews with them. Cavaco elsewhere shifted to the unsubstantiated claim that Bartosh was "lying" in order

to justify his summary firing of Bartosh on August 3 while then only suspending coworker Mariano. The record does not support this assertion and Bartosh admittedly was not fired for "lying." Cavaco elsewhere shifted to the claim that Bartosh had "falsified" years earlier his job applications and had used "abusive and intimidating language" in order to justify the discharge and denial of reinstatement of this employee. I do not credit these assertions. And, in like vein, counsel for Respondent now belatedly attempts to justify Mariano's firing and denial of reinstatement by citing two 1987 disciplinary actions given to Mariano long before management had elevated the employee to maintenance mechanic. It is undisputed that Mariano was being considered for a pay raise shortly before the organizational effort involved here.

On this record, I reject as incredible and pretextual the essentially unsubstantiated and shifting claims advanced by the Employer to justify the firing and denial of reinstatement of Mariano and Bartosh and, as discussed below, find instead that the weaknesses of these shifting assertions only serve to bolster further the inference that management in fact fired the two employees because of their protected union activities.

The testimony of Gordon concerning the Union's subsequent handbilling at the entrance to the Employer's facility is similarly incredible. Priest testified at length with photographs explaining his conduct that day. His testimony was also substantiated in part by Mariano. On the other hand, Gordon's testimony, as demonstrated above, was confusing, unclear, vague, contradictory, evasive, and unsubstantiated.

In addition, the testimony of Foreman Stiling summarized above was at times unclear, confusing, and contradictory. Foreman Stiling claimed that he observed and tolerated Bartosh and Mariano extend a break area discussion about the Union with garage employee Atkinson for some 15 to 20 minutes. Stiling asserted at one point that he was aware of the Employer's no-solicitation, no-distribution policy because it had been "posted" "on the employee bulletin board in the garage" and in the "lunchroom." Elsewhere, Stiling acknowledged that he first mentioned the above incident to "Company officials," including the plant manager, "two days" after the incident; he "waited" because he "didn't think it was a serious issue"; and, although he as foreman was "in charge of Atkinson" and had "some authority to tell Atkinson where to be at the time," he did not attempt to prevent Atkinson from continuing his conversation with Bartosh and Mariano. Stiling elsewhere acknowledged:

Q. Did you know whether it violated any Company policy?

A. No. I was not aware of it at the time . . . no, I wasn't aware of it.

Atkinson, as noted, was never disciplined for this conduct and did not testify. And, further, Stiling, in his testimony, also attributed to Bartosh a vulgar statement overheard in the lobby while waiting to testify here, now cited by management in an effort to block reinstatement of Bartosh. On this record, I do not find the testimony of Stiling to be trustworthy or reliable.

Likewise, I find the testimony of Office Manager Beren pertaining to the posting by the Employer of its no-solicitation, no-distribution policy unclear and confusing. As noted,

when asked about "the bulletin board near the time clock," he testified, *inter alia*, that he did not "know" about that; that in fact he "did post it above the time clock"; and that he "believe[s] there was" one posted there. When asked: "It is your testimony that such notices you have in front of you were posted above the time clock," he responded: "No. I couldn't say for sure." When asked if he had any "personal knowledge prior to August 3" of anybody violating the no-solicitation, no-distribution policy, he responded: "To my knowledge no, not really." He later recalled being solicited for a contribution for a supervisor whose house had burned down.<sup>19</sup>

### Discussion

Section 7 of the National Labor Relations Act guarantees employees "the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection," as well as "the right to refrain from any or all such activities." Section 8(a)(1) of the Act makes it an unfair labor practice "to interfere with, restrain or coerce employees in the exercise of the rights guaranteed in Section 7." Section 8(a)(3) forbids "discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization."

The credited evidence of record shows and I find and conclude that Respondent Employer, in opposing the Union's attempt to organize and represent its employees at Florence, New Jersey, violated Section 8(a)(1) of the Act by coercively interrogating employees about employee union sympathies and activities, and by threatening to have a union agent arrested while he was engaged in handbilling near the entrance to the Employer's Florence facility. The credited evidence of record also shows and I find and conclude that Respondent Employer violated Section 8(a)(1) and (3) of the Act by discriminatorily discharging employees John Mariano and John Bartosh because they were active on behalf of and supported the Union.

Respondent Employer had for some time prior to the Union's 1990 organizational drive a no-solicitation, no-distribution policy at its Florence plant. The credited evidence of record makes it clear that employees and supervisors violated this policy without any disciplinary action being taken by the Employer. Thus, employees repeatedly solicited their

coworkers at Florence during worktime and in work areas to purchase "Christmas bulbs and candy"; "raffle tickets"; "plants and related merchandise"; "cookies"; "different food"; and "church" products; and to make various "donations." These repeated solicitations consumed up to a quarter of an hour and were made within plain view of and on occasion with the participation of supervisory personnel. Cavaco and Macrides were unaware of any employees previously disciplined for violations of the Employer's no-solicitation, no-distribution policy. And, although Cavaco and Macrides denied knowledge of any "exceptions" to the Employer's no-solicitation, no-distribution policy at Florence, Cavaco had heard about the collection held at the plant for a supervisor whose house had burned down; he had made no effort to determine if that collection was on worktime; and, had he discovered that such a collection was in fact on worktime, "what he would have done" is "a tough one to answer." Moreover, although the Employer also has a "policy" against "sexual harassment," a recent complaint by a female employee against a male employee for a "very serious" violation of this "policy" resulted only in a "written warning." Significantly, the Employer also had in operation at the time a "progressive discipline" policy. (See G.C. Exh. 3.)

In addition, the Employer also had a "lunch and rest breaks" policy, requiring employees, *inter alia*, to "punch out and in" during lunch. The credited evidence of record makes it clear that employees frequently did not comply with this policy without any disciplinary action taken by management. Cavaco even acknowledged on cross-examination that he had observed from the timecards that Mariano "was not punching out" long before the Union's organizational effort. He made no effort to "find out why" before "suspending" and then "firing" the employee. He also did not examine the timecards of other mechanics "to see whether they were punching out during that time." And, as noted, undisputed evidence summarized above documents how extensive the breach of this policy was.

Employee Mariano was hired by the Employer in early 1987. He worked his way up over the years into the trained position of mechanic. His 1987 disciplinary actions were of no consequence to the Employer and, in fact, he was, prior to the events in issue here, being considered for a pay raise. Employee Bartosh was hired in 1988. He too worked his way up into the trained position of mechanic. Management was not concerned with the failure of these employees to "punch out and in" during lunch. Management did not find it necessary to conduct an investigation to ascertain whether or not there were any variations in the 1987 or 1988 job applications of these two employees.

However, lightning suddenly struck when Mariano and Bartosh raised the Union's organizational flag at the Florence plant during the summer of 1990. Supervisor Messner repeatedly questioned the two employees during their 1 week of organizational activities. Messner wanted to know: "have you got a lot of cards signed"; "how's the guys responding"; "how's the support going for the Union"; "have you got the Indians to sign up"; "did you get the truckers to sign up"; "did you get the garage people to sign up"; "what's the percentages." Mariano told Messner that since he could not sign a card as a "supervisor," "I don't think this is any of your business." Human Resources Director Sweeney similarly interrogated the employees: "anything new I should

<sup>19</sup> Foreman Cleaves, as noted, testified that he met Bartosh while "going to lunch" one day; Cleaves "was going to lunch" and Bartosh "was coming from out the other way"; and Bartosh "came up to me and he said here's a Union card; fill it out; so I went to the time [clock and] punched out." Cleaves was some 15 feet from the timeclock at the time. He later gave this card to his supervisor because he "didn't want to have anything to do with it." Cleaves admittedly was not "aware of a Company policy regarding solicitation" at that time. Cavaco concededly did not rely on this incident in deciding to fire Bartosh. As for Kerezsi's related testimony pertaining to another Bartosh solicitation, Kerezsi could not "remember any details of the conversation," and apparently Cavaco did not rely upon this incident in deciding to terminate Bartosh. To the extent the testimony of Cleaves and Kerezsi contradicts the testimony of Bartosh and Mariano, I credit the latter as more complete and reliable.

know about around here like the Union?" When Mariano said "no," Sweeney commented, "[O]h, John," and left the area. Shortly thereafter, management distributed to its Florence employees a letter stating its strong opposition to the Union's organizational drive. And, on the same day, management called in Mariano and Bartosh to the "office" and summarily suspended and fired them.

Mariano credibly recalled that Cavaco, manager of the Employer's four dairy plants, conducted his final interview, as follows:

John, I've got some complaints that you're distributing Union authorization cards around here. . . . Do you have anything to say for yourself? I said, Mr. Cavaco, I have a half hour lunch and two 15 minute breaks. He said, John, as many complaints as I've gotten that you're passing out cards in areas of the plant, you have to be doing it more than your 15 minute breaks and half hour lunch. . . . After that, he said, do you know we have a solicitation policy around here? I said, what is it, Mr. Cavaco, termination? He said, in some instances. I said, in that case, Mr. Cavaco, I'd like you to produce the witnesses, the people that said I've been passing out union authorization cards. At that point, Mr. Sweeney interjected and said, we don't have to show you anything. Again, Mr. Cavaco spoke and said, John, do you have anything to say to redeem yourself? I said, no, I have nothing to say at this time. . . . Mr. Cavaco spoke again and he said, John, we took you out of the cooler, we put you in with maintenance to learn something, and this is how you repay us. Do you have anything to say for yourself? said, no, Mr. Cavaco. He said, John, we're suspending you indefinitely.

Mariano was then told that he "wasn't allowed to go back to [his] locker" and "was escorted off the property." A week earlier, Mariano had discussed a salary increase with plant manager Wood, and Wood had then said, "he would see what he could do for me." Wood, as he escorted Mariano out of the plant on August 3, said to Mariano,

John, didn't we just speak about a week before about this [the salary increase], and then you pull something like this, do you have anything to say? I said, no.

Mariano was suspended without pay. Wood later wrote Mariano formally apprising the employee that he was "terminated."

Management's treatment of Bartosh that same day closely parallels its treatment of Mariano. Bartosh credibly recalled:

[Cavaco] says, John we've been hearing that you've been soliciting on Company grounds, and I denied it . . . and then he goes, do you know what the penalty is for solicitation, and I said no, and he pulled out a three ring binder and he showed me the solicitation policies [G.C. Exh. 2] . . . I looked at them for a minute, and he says, we've had a lot of complaints that you've been soliciting, you've bother[ed] people on their lunch times . . . in the passageway to the cafeteria. He said, what do you say, and I said, they're wrong. He says, well are you telling me all these people are liar[s]. I said, just about . . . and I said, well

it's obvious then if I was soliciting and you've got all these numerous complaints you can go ahead and show me some evidence you've got against me, and he said, we don't have to show you anything. . . . [Cavaco] told me . . . how they sent me to school, how they transferred me to maintenance and how I owed them, and I turned around and slapped them in the face like this, and he said, he had no choice but to let me go, . . . and, I aint sure if it was Sweeney or [Cavaco], said, don't try to take any action against us because if you do [we'll] only prove you were guilty.

Management "escorted" Bartosh out. Bartosh, following his discharge, asked Plant Manager Wood if he "could get something in writing" stating the "reason" for his discharge, and Wood then responded: "You know you were fired for soliciting on Company property," and "that was the end of that."

As recited supra, Cavaco and Macrides asserted that Mariano and Bartosh were fired because they had engaged in a "blatant" and "deliberate" violation of the Employer's no-solicitation policy. Macrides conducted no independent investigation of this alleged "blatant" and "deliberate" violation. Cavaco's asserted investigation was at best cursory and, as demonstrated above, is essentially unsubstantiated in this record. In short, this record does not support management's assertion that Mariano and Bartosh engaged in a "blatant" and "deliberate" violation of the Employer's no-solicitation policy. In fact, the testimony of Respondent's witnesses shows that by and large Mariano and Bartosh complied with the Union's admonition that they conduct their organizational activities in break areas during break times. And, the mutually corroborative testimony of Mariano, Bartosh, and Morris carefully documents management's repeated tolerances in the past of exceptions to its no-solicitation, no-distribution policy.

Cavaco and Macrides shifted to the failure of Mariano and Bartosh to punch out for mealbreaks in an attempt to justify their terminations. However, the undisputed evidence of record shows that the two employees, on many occasions before their organizational efforts, had failed to punch out without discipline. Cavaco did not even mention to or fault the two employees for failing to punch out during his final interview with them. Cavaco shifted to the unsubstantiated claim that Bartosh was "lying" in order to justify his summary firing of Bartosh on August 3 while then only suspending co-worker Mariano. The record does not support this assertion and Bartosh admittedly was not fired for "lying." Cavaco shifted to the claim that Bartosh had "falsified" years earlier his job applications and had used "abusive and intimidating language" in order to justify the discharge and denial of reinstatement of this employee. I do not credit these assertions. I find on this record that management would not have fired Bartosh for the cited variations in job applications filed years earlier or for the alleged crude language cited by Foreman Stiling. Counsel for Respondent now belatedly attempts to justify Mariano's firing and denial of reinstatement by citing two 1987 disciplinary actions given to Mariano long before management had elevated the employee to maintenance mechanic. Mariano was being considered for a pay raise shortly before the Union's organizational effort involved here and management apparently did not even consider the employ-

ment records of these two employees before terminating them.

I find and conclude here that Respondent Employer fired employees Mariano and Bartosh because they alone were attempting to organize their coworkers at Florence, in an effort to discourage further employee support of the Union, and thus in violation of Section 8(a)(1) and (3) of the Act. I reject as incredible and pretextual the essentially unsubstantiated and shifting claims advanced by the Employer to justify the firing and denial of reinstatement of Mariano and Bartosh and find instead that the weaknesses of these shifting assertions only serve to bolster further the inference that management in fact fired the two employees because of their protected union activities. I similarly reject the Employer's related assertion that it would have fired these two employees for nondiscriminatory reasons as contrary to the credited evidence of record. Moreover, I find and conclude that the repeated efforts by Supervisor Messner and Human Resources Director Sweeney to pry into employee protected union activities constitute on this record proscribed coercive interrogation, in violation of Section 8(a)(1) of the Act.

Counsel for Respondent Employer argues that Messner was not a "supervisor" as alleged. A "supervisor" is defined in Section 2(11) of the Act as

any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Actual existence of true supervisory power is to be distinguished from abstract, theoretical, or rule book authority. It is well established that a rank-and-file employee cannot be transformed into a supervisor merely by investing him or her with a "title and theoretical power to perform one or more of the enumerated functions." *Southern Bleachery & Print Works*, 257 F.2d 235, 239 (4th Cir. 1958), cert. denied 359 U.S. 911 (1959). What is relevant is the actual authority possessed and not the conclusory assertions of witnesses. And while the enumerated powers listed in Section 2(11) of the Act are to be read in the disjunctive, Section 2(11) also "states the requirement of independence of judgment in the conjunctive with what goes before." *Poultry Enterprises v. NLRB*, 216 F.2d 798, 802 (5th Cir. 1954). Thus, the individual must consistently display true independent judgment in performing one or more of the enumerated functions in Section 2(11) of the Act. The performance of some supervisory tasks in a merely "routine," "clerical," "perfunctory," or "sporadic" manner does not elevate a rank-and-file employee into the supervisory ranks. *NLRB v. Security Guard Service*, 384 F.2d 143, 146-149 (5th Cir. 1967). Nor will the existence of independent judgment alone suffice; for "the decisive question is whether [the individual involved] has been found to possess authority to use [his or her] independent judgment with respect to the exercise [by him or her] of some one or more of the specific authorities listed in Section 2(11) of the Act." See *NLRB v. Brown & Sharpe Mfg. Co.*, 169 F.2d 331, 334 (1st Cir. 1948).

Applying these principles of law to the credited evidence of record, I find and conclude that Messner was a "supervisor" as alleged. He exercised independent judgment in assigning various jobs to the four or five mechanics on the night shift; he determined when they took breaks; he approved their overtime; he allowed them to leave work early; he initialed their timecards; he had the authority to recommend disciplinary action; he was apparently the only person in charge of the night-shift mechanics during all or most of their shift; he, unlike the rank-and-file night-shift mechanics, did not work with tools during most of the shift; and he was held out by management as the "supervisor" on the night shift. Counsel for Respondent only disputed Messner's supervisory status "as to time." Messner never testified and no attempt was made to explain what "time" he was a "supervisor." Under all the circumstances, I find that Messner had the authority to effectively recommend the discipline of employees; he could responsibly assign work to and direct other employees; and the exercise of such authority by him was not merely of a clerical, sporadic, or routine nature but required the use of his independent judgment.

Finally, I find and conclude that Respondent Employer also violated Section 8(a)(1) of the Act when it threatened Union Representative Priest with arrest while he was engaged in handbilling in a public place near the entrance to the Employer's Florence plant. Cf. *Gainseville Mfg. Co.*, 271 NLRB 1186 (1984). As recited above, Priest was standing at the time some distance from what appeared to be the Employer's fence and property line the Employer made no attempt to explain to Priest where it believed its property line was located; the Employer instead told Priest that he was on the Employer's property and would be arrested "if [he] didn't remove [himself]"; the police were summoned but made no arrest; and no effort was made at this hearing to demonstrate reliably where in fact the Employer's property line ended. The credited evidence shows that Priest stood upon what appeared to be and was regarded as the public land and engaged in protected activity; was then threatened with arrest by an agent of Respondent; and no credible demonstration to the contrary has been made here. I am persuaded that the Employer's conduct in this instance was part and parcel of its effort to chill protected Section 7 activities at its Florence plant.

#### CONCLUSIONS OF LAW

1. Respondent is an Employer engaged in commerce as alleged, and Charging Party Union is a labor organization as alleged.

2. Respondent Employer violated Section 8(a)(1) of the Act by coercively interrogating employees about employee union sympathies and activities, and by threatening to have a union agent arrested while he was engaged in handbilling near the entrance to the Employer's Florence facility.

3. Respondent Employer violated Section 8(a)(1) and (3) of the Act by discriminatorily discharging employees John Mariano and John Bartosh because they were active on behalf of and supported the Union.

4. The unfair labor practices found above affect commerce as alleged.

## REMEDY

To remedy the unfair labor practices found above, Respondent Employer will be directed to cease and desist from engaging in such conduct and like or related conduct and to post the attached notice. Respondent Employer has been found to have violated Section 8(a)(3) of the Act by discriminatorily discharging employees Mariano and Bartosh. Respondent Employer will therefore be directed to offer employees Mariano and Bartosh immediate and full reinstatement to their former jobs or in the event their former jobs no longer exist to substantially equivalent jobs without prejudice to their seniority or other rights and privileges, and make them whole for any loss of earnings they may have suffered by reason of their unlawful firings by making payment to them of a sum of money equal to that which they normally would have earned from the date of Respondent's discrimination to the date of its offer of reinstatement, less net earnings during such period, with backpay to be computed as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and interest as provided in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962). Further, Respondent Employer will be directed to preserve and make available to the Board or its agents on request all payroll records and reports and all other records necessary to determine backpay under the terms of this decision and Order. Respondent Employer will also be directed to expunge from its files any reference to the disciplinary action and firings of Mariano and Bartosh found unlawful herein, in accordance with *Sterling Sugars*, 261 NLRB 472 (1982).<sup>20</sup>

## ORDER

The Respondent, Cumberland Farms, Inc., Florence, New Jersey, its officers, agents, successors, and assigns, shall

## 1. Cease and desist from

(a) Coercively interrogating employees about employee union sympathies and activities, and threatening to have a union agent arrested while he was engaged in handbilling near the entrance to the Employer's Florence, New Jersey facility.

<sup>20</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) Discriminatorily discharging employees because they support the Union, United Food and Commercial Workers Local 1360, AFL-CIO, or any other labor organization, or because they engage in other protected concerted activities.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed to them in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer employees Mariano and Bartosh immediate and full rein statement to their former jobs or in the event their former jobs no longer exist to substantially equivalent jobs without prejudice to their seniority or other rights and privileges, and make them whole for any loss of earnings they may have suffered by reason of their unlawful firings, with interest, as provided in this decision.

(b) Preserve and, on request, make available to the Board or its agents for examination or copying all payroll records, social security payment records, timecards, personnel records and reports, as well as all other records necessary or useful in analyzing and computing the amount of backpay, as provided in this decision.

(c) Remove from its files any reference to the disciplinary actions and firings of employees Mariano and Bartosh, and notify them in writing that this has been done and that evidence of this unlawful disciplinary action will not be used as a basis for future personnel action against them.

(d) Post at its Florence, New Jersey facility copies of the attached notice marked "Appendix."<sup>21</sup> Copies of said notice, on forms provided by the Regional Director for Region 4, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof in conspicuous places, including all places where notices to employees are customarily posted, and be maintained for a period of 60 consecutive days. Reasonable steps shall be taken to ensure that notices are not altered, defaced or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

<sup>21</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."